In the Matter of the Compensation of
MICHAEL K. SPURGEON, Claimant
WCB Case No. 21-03717
ORDER ON REVIEW
Johnson Johnson Lucas et al, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Ousey. Member Ousey concurs.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Cordes's order that awarded 26 percent whole person impairment for claimant's lumbar strain and L4-5 disc protrusion conditions, whereas an Order on Reconsideration awarded 21 percent. On review, the issue is extent of permanent disability (permanent impairment).[1] We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary. Claimant worked as a truck mechanic when, on April 3, 2012, he injured his low back while installing a new suspension line on a vehicle. (Ex. 2). SAIF ultimately accepted a lumbar strain and a 5mm disc protrusion at L4-5 on the right side. (Ex. 3).

On March 29, 2021, SAIF issued a Notice of Closure awarding 21 percent whole person impairment for range of motion (ROM) loss and surgical values at the lumbar spine and strength loss in the left leg, based on the findings of Dr. Philips, claimant's attending physician. (Ex. 10). The Notice of Closure did not award a "chronic condition" impairment value. (*Id*.) Claimant requested reconsideration, contesting the impairment findings. (Ex. 11).

Subsequently, Dr. Philips responded to a letter from claimant's counsel indicating that claimant was able to repetitively use his low back and left leg for 4 hours in an 8-hour day. (Ex. 12). On August 17, 2021, the Appellate Review Unit (ARU) of the WCD issued an Order on Reconsideration that found that claimant was not entitled to an impairment award for a chronic condition in his low back or left leg under OAR 436-035-0019(1) because Dr. Philips's findings did not

[1] The Workers' Compensation Division (WCD) chose to participate in this matter pursuant to ORS 656.726(4).

establish that he was prevented from repetitively using his low back or left leg for more than two-thirds of a period of time. (Ex. 13-4). Consequently, the Order on Reconsideration affirmed the Notice of Closure's award of 21 percent whole person impairment. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Analyzing the definition of "significantly limited in the repetitive use of a body part" in OAR 436-035-0019(1), the ALJ reasoned that a worker is significantly limited in the repetitive use of a body part if the worker is restricted from using the body part for one-third or more of a period of time. Relying on the findings of Dr. Philips that claimant was restricted in repetitively using his low back and left leg 50 percent of an 8-hour period, the ALJ concluded that claimant was entitled to a 5 percent "chronic condition" award for both his low back and left leg.

On review, SAIF contends that claimant is not entitled to a "chronic condition" award. Specifically, SAIF asserts that the ARU's interpretation of OAR 436-035-0019(1) (*i.e.*, that a worker is not "significantly limited in the repetitive use a body part" unless the worker is restricted from using the body part for more than two-thirds of a period of time) is plausible and entitled to deference. Based on the following reasoning, we agree with SAIF's contentions.

Claimant has the burden to establish the extent of his permanent disability and, as the party challenging the Order on Reconsideration's determination that he was not entitled to a "chronic condition" award, he has the burden to establish error in the reconsideration process. ORS 656.266(1); ORS 656.283(6); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183-84 (2000).[2]

OAR 436-035-0019(1) provides that a worker is entitled to a 5 percent chronic condition impairment value for each applicable body part when a preponderance of medical opinion establishes that, due to a chronic and permanent medical condition, the worker is significantly limited in the repetitive use of one or more of the body parts. The rule further provides that "significantly limited in the repetitive use" means that "the worker is unable to repetitively use a body part * * * for more than two-thirds of a period of time." OAR 436-035-0019(1).

[2] Because the Notice of Closure issued on March 29, 2021, we apply the standards found in WCD Admin. Order 20-051 (eff. March 1, 2020). OAR 436-035-0003(1), (4).

We defer to the WCD's plausible interpretation of its own rules, including an interpretation made in the course of applying the rule. *SAIF v. Donahue-Birran*, 195 Or App 173, 181 (2004). That deference extends to the ARU, which is the delegate of the Director and has the authority to determine the proper application of OAR 436-035-0019(1). *Id*.

Here, as noted above, the ARU determined that the findings noted in Dr. Philips's March 17 response (*i.e.*, the 50 percent limitation on claimant's repetitive use of his low back and left leg) did not establish a limitation that "prevent[ed] repetitive use of the low back and left leg for more than two thirds of a period of time" for purposes of OAR 436-035-0019(1). (Ex. 13-4). Thus, in applying OAR 436-035-0019(1), the ARU implicitly interpreted the phrase "unable to repetitively use a body part * * * for more than two-thirds of a period of time" as requiring that a worker is *restricted* from using the body part for more than two-thirds of a period of time.[3] Under such circumstances, the ARU's Order on Reconsideration constitutes an interpretation of OAR 436-035-0019(1) that is entitled to deference. *See Deschutes County v. Leak*, 322 Or App 396 (2022); *SAIF v. Donahue-Birran*, 195 Or App 173, 180-81 (2004) (in applying a rule that had two possible meanings, the ARU implicitly interpreted the rule as having one of those meanings, and the interpretation was entitled to deference).

Thus, we consider whether that interpretation is plausible. To determine whether an agency's interpretation is plausible, we use the same interpretive framework for administrative rules that we use for statutes. *See Godinez v. SAIF*, 269 Or App 578, 582-83 (2015). That is, we consider the text of the rule itself, together with its context and history to discern the intent of the agency. *Id.* at 583.

As described above, OAR 436-035-0019(1) defines "significantly limited in the repetitive use" as "*unable* to repetitively use the body part * * * for more than *two-thirds* of a period of time." *Id.* (emphasis added). The text of that definition can plausibly be interpreted to mean that a "significant limitation" exists when the worker is *restricted* from the repetitive use of a body part for more than two-thirds of a period of time. Thus, the ARU's interpretation is plausible based on the text of the rule.

[3] This interpretation is consistent with the interpretation of OAR 436-035-0019(1) asserted in the WCD's brief.

Further, based on the following reasoning, the history of OAR 436-035-0019(1) supports the ARU's interpretation of the rule.

The prior version of OAR 436-035-0019(1) provided, like the current rule, that a worker was entitled to a 5 percent chronic condition impairment value for a body part when the worker was significantly limited in the repetitive use of the body part. *See* WCD Admin. Order 15-053 (eff. March 1, 2015). But, unlike the current rule, the former rule did not define "significantly limited in the repetitive use." *See id.* Instead, in 2014, the WCD issued an Industry Notice explaining its interpretation of "significantly limited." *See* Industry Notice, Workers' Compensation Division (Dec. 22, 2014).[4]

In *Broeke v. SAIF*, 300 Or App 91 (2019), the court analyzed the 2014 Industry Notice to determine whether a questionnaire SAIF had provided to a physician was consistent with the Industry Notice's/WCD's interpretation of "significantly limited." In doing so, the court noted that the Notice provided that a worker was "significantly limited" in the repetitive use of a body part when the worker was limited to *frequent use* of the body part, which the Notice defined as the *ability to use the body part for up to two-thirds of a period of time*. *Id.* at 98-99. Based on the Notice's discussion of "frequent use," the court concluded that the Industry Notice/WCD clearly intended a "significant limitation" to exist when a worker *could use the body part up to two-thirds of a period of time* (or, said another way, that the worker was restricted from using the body part for one-third or more of a period of time).[5] *Id.*

In December 2019, in response to the court's decision in *Broeke*, the WCD issued an updated Industry Notice clarifying its interpretation of "significantly limited" in the repetitive use of a body part under *former* OAR 436-035-0019(1). *See* Industry Notice, Workers' Compensation Division. The updated Industry

[4] Referencing the dictionary definitions of "significant" and "limited," the Notice provided that it was necessary to determine when a confinement or restriction to the repetitive use of a body part was important, meaningful, or notable. Industry Notice, Workers' Compensation Division (December 22, 2014). It explained that the WCD would "interpret confined or restricted ('limited') 'repetitive use' under OAR 436-035-0019(1) as important, meaningful, or notable ('significant') when the worker was limited to frequent use of the body part." *Id.* The Notice defined "frequent" as the ability to use the body part for up to two-thirds of a period of time. *Id.* Finally, the Notice stated that, based on its analysis regarding "frequent use," the WCD interpreted the "relevant inquiry under OAR 436-035-0019(1) as follows: Because of a permanent and chronic condition caused by the compensable injury, is the worker unable to repetitively use the body part or system for more than two-thirds of a period of time?" *Id.*

[5] In *Wiggins v. SAIF*, 300 Or App 319 (2019), the court relied on its decision in *Broeke* to interpret the WCD's 2014 Industry Notice in the same manner.

Notice provided that the *Broeke* court's interpretation of its 2014 Notice was not consistent with the WCD's intent. *Id.* It explained that the WCD interpreted the relevant inquiry for determining whether a worker is significantly limited as whether the worker has "permanently lost the ability to repetitively use the body part for more than two thirds of a period of time (or said another way, when the worker is only able to repetitively use the body part for less than one-third of a period of time). *Id.*

Shortly before issuing the 2019 Industry Notice, the WCD also formed a rulemaking advisory committee to consider several updates to its disability rating standards, including the "chronic condition" standard under OAR 436-035-0019(1). In an issues document submitted to the Advisory Committee, the WCD proposed that "significantly limited in the repetitive use" be defined by rule. Consistent with the 2019 Industry Notice, the issues document explained that the court's interpretation of its 2014 Industry Notice was inconsistent with the WCD's intent. Disability Rating Standards Issues Document, Rulemaking Advisory Committee Meeting, Workers' Compensation Division (November 19, 2019). The document further provided that the WCD maintained that the appropriate inquiry was: "Because of a permanent and chronic condition caused by the compensable injury, is the worker unable to repetitively use the body part for more than two-thirds of a period of time?" *Id.* Effective March 1, 2020, the WCD enacted the applicable version of OAR 436-035-0019(1), which, consistent with the issues document, defined "significantly limited in the repetitive use" of a body part as "unable to repetitively use the body part for more than two-thirds of a period of time." WCD Admin Order 20-051, eff. March 1, 2020.

Thus, the rule history demonstrates that the applicable version of the rule was intended to clarify that the WCD's interpretation of "significantly limited in the repetitive use" differed from the *Broeke* court's interpretation of its 2014 Industry Notice and that the WCD intended to interpret "significantly limited" to mean that a worker was "restricted from the repetitive use of a body part for more than two-thirds of a period of time." Because the ARU's interpretation is consistent with that intent, it is supported by the history of OAR 436-035-0019(1).

Claimant contends that the applicable version of the rule's use of the phrase "unable to repetitively use a body part for more than two-thirds of a period of time" can only plausibly be interpreted in a manner consistent with the *Broeke* court's interpretation of the 2014 Industry Notice (*i.e.*, that a worker is significantly limited if the worker is able to repetitively use the body part for up to two-thirds of a period of time), because the same phrase was included in the 2014 Notice. We disagree.

We acknowledge that the 2014 Notice interpreted by the court in *Broeke* included the same language used in the current rule. Specifically, the 2014 Notice described the "relevant inquiry" as whether a worker was "unable to repetitively use the body part or system for more than two-thirds of a period of time[.]" However, in analyzing the 2014 Industry Notice, the *Broeke* court did not interpret that phrase in isolation. Rather, as explained above, the court's analysis focused almost exclusively on the Notice's discussion of "frequent use" – that is, that a significant limitation existed when a worker was limited to frequent use of a body part, which was described as up to two-thirds of a period of time. Neither the current rule nor its rulemaking history include the "frequent use" discussion relied on by the court in analyzing the 2014 Notice. Accordingly, the *Broeke* court's interpretation of the 2014 Notice does not compel a particular interpretation of "unable to repetitively use the body part for more than two-thirds of a period of time."[6]

Claimant also contends that the ARU's interpretation of OAR 436-035-0019(1) is not plausible because it is not consistent with the dictionary definitions of "significant" referenced in the 2014 Industry Notice. Again, we disagree.

The 2014 Industry Notice referenced the dictionary definitions of "significant" in interpreting *former* OAR 436-035-0019(1) because "significantly limited [was] not defined by statute or rule." *See* Industry Notice, Workers' Compensation Division (Dec. 22, 2014). By contrast, the current version of OAR 436-035-0019(1) specifically defines "significantly limited in the repetitive use," to mean "unable to repetitively use a body part for more than two-thirds of a period of time." Under such circumstances, we are not free to substitute the dictionary definitions of "significant" for the definition provided in the rule. *See Abraham v. Corizon Health, Inc.*, 369 Or 735, 755 (2022); *see also Patton v. Target Corp.*, 349 Or 230, 239 (2010) ("Of course, the legislature is free to define words to mean

[6] In so concluding, we note that, in isolation, the phrase "unable to repetitively use the body part for more than two-thirds of a period of time" is somewhat ambiguous. Specifically, although that phrase could plausibly be interpreted to mean that a worker is "significantly limited" if the worker is *restricted* from using a body part for more than two-thirds of a period of time (consistent with the ARU's interpretation), it could also be interpreted to mean that a worker is "significantly limited" if the worker is *able to* use a body part for up to but not more than two-thirds of a period of time (consistent with the *Broeke* court's interpretation of the 2014 Industry Notice). However, when determining the plausibility of an interpretation by the ARU, the mere fact that a different interpretation is also plausible does not demonstrate that the ARU's interpretation is not. *See DeLeon, Inc. v. DHS*, 220 Or App 542, 548 (2008) ("[I]t is settled that a plausible alternative construction of an agency rule does not mean that an agency's own construction is implausible.")

anything that it intends them to mean, including defining words in a manner that varies from a dictionary definition or common understanding). Therefore, the dictionary definitions of "significant" do not support a conclusion that the ARU's interpretation of "significantly limited" in OAR 436-035-0019(1) is not plausible.

Accordingly, based on the aforementioned reasoning, we conclude that the ARU's interpretation of OAR 436-035-0019(1) is plausible and we find no error in the reconsideration process. *See* ORS 656.283(6); *Callow*, 171 Or App at 183. Consequently, we reverse the ALJ's order.

ORDER

The ALJ's order dated March 23, 2022, is reversed. The August 17, 2021, Order on Reconsideration is reinstated and affirmed. The ALJ's out-of-compensation attorney fee award is reversed.

Entered at Salem, Oregon on December 15, 2023

Member Ousey concurring.

Based on the principles of *stare decisis* and the application of *Godinez v. SAIF*, 269 Or App 578, 582-83 (2015), and *SAIF v. Donahue-Birran*, 195 Or App 173, 181 (2004), I agree that the Appellate Review Unit's (ARU's) interpretation of OAR 436-035-0019 is entitled to deference. However, I write separately to express my concerns regarding the rule.

"When clarity and readability of statutes and rules increase, the need for litigation over meaning decreases and voluntary compliance increases." George C. Pratt, *Introduction* to Bryan A. Garner, *Guidelines For Drafting And Editing Court Rules* at vii (2007).[7] OAR 436-035-0019 has resulted in extensive litigation over its meaning. *See Wiggins v. SAIF*, 300 Or App 319 (2019); *Broeke v. SAIF*, 300 Or App 91 (2019); *Spurger v. SAIF*, 292 Or App 227 (2018); *Godinez v. SAIF*, 269 Or App 579 (2015); *Spurger v. SAIF*, 266 Or App 183 (2014). Although the ARU's interpretation of OAR 436-035-0019 is plausible, the rule is not clear or readable. As demonstrated by the ALJ's interpretation in this case and the court's interpretation in *Broeke* (in which the court reviewed the 2014 Industry Notice,

[7] George C. Pratt is a Retired Judge of the U.S. Court of Appeals for the Second Circuit and Former Chair of the Style Subcommittee for the Federal Rules of Practice and Procedure.

which included the "more than two-thirds of a period of time" language), OAR 436-035-0019 can easily be read to authorize a chronic condition impairment award if a worker is able to use a body part for up to, but not more than two-thirds of a period of time. (Ex. 2A); 300 Or App at 98-99. However, as set forth in the lead opinion, such an interpretation differs from that intended by the Workers' Compensation Division (WCD). (*See* Ex. 4A).

The rule's lack of clarity is further represented by the multiple industry notices (in 2014 and 2019) necessary to explain the rule's meaning and to respond to court decisions that have interpreted the rule differently. (Exs. 2A, 4A). Yet, workers, physicians, and claims adjusters (*i.e.*, those who have to interpret and apply OAR 436-035-0019) should not have to reference industry notices to determine the rule's meaning. OAR 436-035-0019 should speak for itself.

Further, "more than two-thirds of a period of time" is vague. Two-thirds of one hour (40 minutes) is not the same as two-thirds of 12 hours (8 hours). However, under OAR 436-035-0019, a worker who is restricted from repetitively using a body part for more than 40 minutes in a one-hour period would presumably receive the same 5 percent chronic condition award as a worker who was restricted from repetitively using a body part for more than 8 hours in a 12-hour period.[8]

Moreover, when the WCD amended OAR 436-035-0019 in 2020, it did not clarify the "more than two-thirds of a period of time" language. *See* WCD Admin Order 20-051, eff. March 1, 2020. Specifically, the 2020 amendment did not include clarifying language from the 2019 Industry Notice; *i.e.*, that unable to repetitively use a body part for more than two-thirds of a period of time means that "the worker is only able to repetitively use the body part for less than one-third of a period of time." (Ex. 4A-2). Consequently, the rule continues to be the subject of litigation, as demonstrated by the instant case.

Thus, I encourage the WCD to again amend OAR 436-035-0019 – this time, not just so it is possible to understand, but so it cannot be misunderstood. Nevertheless, because *Godinez* and *Donahue-Birran* require deference to a plausible agency interpretation, I concur with the outcome of this case.

[8] I also note that OAR 436-035-0019 is incongruous from a policy standpoint when compared to other impairment rules. For example, OAR 436-035-0019 authorizes a 5 percent chronic condition impairment award if the worker is restricted from repetitively using a body part for more than two-thirds of a period of time, whereas OAR 436-035-0230(14) authorizes a 15 percent impairment award for a leg injury if the worker is restricted from being on their feet for more than one-fourth of an eight hour period.